No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

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INTERESTS OF AMICI CURIAE[1]

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in all fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure

[1] Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored any part of this brief, and no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as amicus curiae in litigation relating to criminal-law issues, particularly those issues that affect indigent defendants in federal court. The Association has appeared as amicus curiae in litigation before this Court and the federal courts of appeals.

STATEMENT

Around 1:40 a.m. on November 27, 2001, petitioner was riding in a car driven by Karen Simeroth when a police car behind them activated its lights and forced them to the side of the road. Pet. App. 35. The officer—Sutter County Sheriff's Deputy Robert Brokenbrough—had noticed several hours earlier that the car (then parked in a convenience store lot) had expired registration tags. *Id.* at 105, 113. Although the officer observed that the car had a valid temporary operating permit, he decided to pull the car over anyway when he saw it on the road later that night. *Id.* at 67. The State now concedes that this stop was unjustified and unlawful. *Id.* at 38-39.

After turning on a floodlight to illuminate the scene (Pet. App. 108), the officer approached the stopped car and asked Ms. Simeroth for her driver's license (*id.* at 35). He then asked petitioner to identify himself as well, because he immediately "recognized [petitioner] as one of [two] Brendlin brothers . . . and recalled that one of them had absconded from parole supervision." *Id.* at 35.

The officer walked back to his patrol car, from which, standing outside the passenger door, he ran a police-radio check on petitioner. Pet. App. 112. As the officer watched petitioner tentatively open his car door, he became "concern[ed]" that petitioner might try "to flee from that location from the vehicle." *Id.* at 122. Indeed, the officer was sufficiently concerned that he requested police backup even before he had confirmed that petitioner was the absconded parolee he appeared to be. *Id.* Petitioner nonetheless closed the door and remained in the car, evidently concluding that an escape attempt would be futile.

Within minutes, the officer confirmed that petitioner was, in fact, Bruce Brendlin and that there was a warrant for his arrest. Pet. App. 35, 67-68. The officer ordered him out of the car at gunpoint and arrested him. *Id.* at 35. A search revealed a syringe cap on petitioner's person. *Id.* at 36. In a subsequent search of the driver and car, the officer discovered two syringes, one of which was missing a cap, as well as drugs and related materials. *Id.* at 35, 94-98.

Petitioner was charged with multiple drug counts under California law. At his trial, he argued that the evidence discovered through the traffic stop should be suppressed as the fruit of his illegal seizure. Pet. App. 36. The trial court denied this suppression motion, and petitioner entered a guilty plea subject to an appeal on the suppression issue. *Id.* The intermediate state court of appeals then reversed on that issue, reasoning that a passenger is seized within the meaning of the Fourth Amendment when the car in which he is riding is pulled over for a traffic stop. *Id.* at 72-73. The court held that, because the traffic stop was unlawful, and because all of the evidence against petitioner was discovered as a direct consequence of that unlawful stop, the drug evidence should have been suppressed as "fruit of the poisonous tree." *Id.* at 75 (internal quotation marks omitted).

The California Supreme Court reversed and reinstated petitioner's conviction. It reasoned that a passenger in a car stopped by police is generally not "seized" in a routine traffic stop. Pet. App. 34, 45-46. Because the court determined

that the stop had not violated petitioner's Fourth Amendment rights, it did not address the application of the exclusionary rule in these circumstances. *See id.* at 34, 52.

SUMMARY OF ARGUMENT

The question presented in this case is whether, in making a traffic stop that "seizes" the driver and her vehicle for Fourth Amendment purposes, an officer also seizes the passengers in that vehicle. That question can be divided into two parts. *First*, is a passenger subjected to a seizure when the police force the car in which he is riding over to the side of the road? *Second*, if so, how long does that seizure last? Does it end a few moments after the car comes to a stop, when the passenger has had time to unfasten his seat belt, open the door, and step out of the car; or does it continue until the passenger receives some objective indication that he may walk away and determines that he may safely do so?

1. On the first issue, there can be no serious question that the police "seized" petitioner, at least momentarily, when they forced the car in which he was riding to the side of the road. Under established precedent, police officers "seize" an individual whenever they cause any meaningful interference, however brief, with his freedom of movement. A traffic stop inarguably interferes with the freedom of movement of the driver and passenger alike by precluding them from continuing to travel towards their agreed-upon destination. This interference is most obvious during the period in which the car is coming to a stop, because a passenger obviously cannot leave the scene during that interval unless he throws himself from a moving vehicle.

2. To resolve this particular case, it is not strictly necessary for this Court to decide *how long* petitioner remained seized after the car came to rest, because the evidence petitioner seeks to suppress is the tainted fruit of the initial phase of this unlawful traffic stop. Nonetheless, this Court should give needed guidance to courts and law enforcement authorities by clarifying that, during a traffic stop, a passenger remains seized for Fourth Amendment purposes until

(a) he has received some objective indication that he is free to leave and (b) he can safely and practically do so.

a. Citing concerns about officer safety, this Court and others have granted the police extraordinary authority to control the movements of passengers during traffic stops. For example, every federal court of appeals that has addressed the issue has held that officers may order passengers to remain seated in the car during a stop. Given the potentially volatile nature of traffic stops, a reasonable passenger would not feel free to walk away until, at a minimum, the officer has approached the car and given the passenger some basis for concluding that he may leave.

In addition, a typical passenger has no way of knowing until he has made contact with the officer that a traffic stop relates solely to the driver's conduct, because police commonly and lawfully stop cars for reasons relating to passengers. That uncertainty is particularly pronounced in a case like this one, where an officer has pulled a car over because he *mistakenly* believes the driver has committed a traffic offense. In such cases, the passenger will have no reason to think that the *driver* has given the officer any reason to stop the car, and he thus cannot know whether he would be thwarting the very purpose of the traffic stop if he stepped out of the car and walked away.

b. Even after an officer indicates that a passenger is formally free to leave, the passenger should still be deemed "seized" if the surroundings make it unsafe or infeasible for the passenger to walk away. The California Supreme Court concluded otherwise only because it mistakenly analogized this case to those in which this Court has held that officers do not "seize" a passenger when they ask him questions on a bus during a scheduled stop, even if the passenger would find it inconvenient to leave the bus. This Court based that holding, however, on the twin assumptions that the bus passenger could have refused to answer the officers' questions and that, if he had done so, their presence on the bus would not have affected him in any respect.

Here, in contrast, the officer did not approach the car while it was stopped anyway; rather, he forced it to the side of the road against the wishes of the driver and passenger. Then, having unlawfully detained the car and its occupants, he immediately recognized petitioner and launched the inquiry that led to petitioner's arrest on drug charges. Unlike the bus passengers, petitioner was subject to a classic (and wrongful) seizure that led directly to the discovery of the evidence used against him in his subsequent prosecution.

ARGUMENT

I. A TRAFFIC STOP INHERENTLY SUBJECTS A PASSENGER TO A SEIZURE BY INTERFERING WITH HIS FREEDOM OF MOVEMENT

Law enforcement officers effect a "'seizure' of a person within the meaning of the Fourth Amendment" when they intentionally cause any "meaningful interference, however brief, with an individual's freedom of movement." *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (collecting cases). Although "a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police" is a seizure. *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980); *see also Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

Under that long-established formulation, a traffic stop necessarily produces at least a momentary "seizure" of the car and everyone in it. When the police order a car to pull over, they "interfere" with the "movement" of driver and passenger alike, both of whom would otherwise continue traveling towards their mutually agreed-upon destination. Here, for example, when the officer forced Ms. Simeroth to stop, he necessarily diverted petitioner from his intended course and located him in a place not of his choosing at the side of a dark road. That restriction on petitioner's "freedom of movement" may persist throughout a traffic stop, as discussed in Part II below, but it is inevitable and unavoidable during the period in which the detained car is still coming to a stop, because a passenger obviously cannot "walk away"

from the scene at that point except by flinging himself from a still-moving car onto the pavement.

This Court was thus stating the obvious when it explained in *Berkemer* v. *McCarty* that "a traffic stop significantly curtails the 'freedom of action' of the driver *and the passengers*, if any, of the detained vehicle" and "'constitute[s] a "seizure" within the meaning of [the Fourth] Amendmen[t].'" 468 U.S. 420, 436-437 (1984) (emphasis added) (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979)); *see also Whren* v. *United States*, 517 U.S. 806, 809-10 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision."); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment.").[2] More generally, when the police "seize" any object, they logically seize its contents as well.[3] Of course, the mere fact that the passenger is "seized" in this sense does not mean that the police violate the Fourth

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[2] *See also United States* v. *Hensley*, 469 U.S. 221, 226 (1985) (noting that "stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment"). The federal courts of appeals have also recognized that a passenger in a vehicle is seized when police stop that vehicle. *See, e.g.*, *United States* v. *Mosley*, 454 F.3d 249, 253 & n.6 (3d Cir. 2006); *United States* v. *Grant*, 349 F.3d 192, 196 (5th Cir. 2003); *United States* v. *Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States* v. *Gama-Bastidas*, 142 F.3d 1233, 1239 (10th Cir. 1998); *United States* v. *Kimball*, 25 F.3d 1, 5 (1st Cir. 1994).

[3] *See, e.g.*, *Davis* v. *Gracey*, 111 F.3d 1472, 1480 (10th Cir. 1997) (noting that police incidentally seized electronic files stored on a computer, even though the contents of the computer were not targeted by police and police had seized the computer only because it was an instrumentality of a crime); *cf. United States* v. *Place*, 462 U.S. 696, 715 (1983) (Brennan, J., concurring in the judgment) ("*Terry* stops may involve seizures of personal effects incidental to the seizure of the person involved. Obviously, an officer cannot seize a person without also seizing the personal effects that the individual has in his possession at the time.").

Amendment whenever they pull over a car without suspecting the passenger of complicity in the driver's traffic violation. Such a seizure will be lawful when (and only when) it is incidental to a *valid* traffic stop. *See Whren*, 517 U.S. at 810; *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (applying Fourth Amendment balancing test and concluding that it is reasonable for officers to order passengers to stand outside of car during any traffic stop).

The California Supreme Court sought to distinguish *Berkemer* on the ground that this Court's Fourth Amendment discussion in that case was not strictly essential to its Fifth Amendment holding (that traffic stops, while "seizures," are not "custodial interrogations" for *Miranda* purposes), 468 U.S. at 435-440. Pet. App. 42-43. Whether or not that is so, *Berkemer*'s Fourth Amendment discussion reflects the considered views of this Court, and it is obviously correct: when the police force a car to the side of the road, they do in fact "curtail[] the 'freedom of action'" of the driver and passengers alike, and they subject them all to a "seizure" for purposes of the Fourth Amendment. *See* 468 U.S. at 436-437.

The California Supreme Court also sought to justify its contrary conclusion on the theory that passengers do not usually view their own actions as the cause of a traffic stop and thus, for example, do not share the driver's "sinking feeling . . . upon seeing police lights in the rearview mirror" (Pet. App. 45 (internal quotation marks omitted)). But when the police successfully constrain a person's freedom of movement, his "feelings" are irrelevant: he is subject to a "seizure" whether or not he is subjectively worried that he is the focus of the police investigation. Indeed, the only context in which a private person's state of mind *could* matter to the question of whether the police have initiated a seizure of him is where the police have *not* physically constrained his movement—for example, when police simply strike up a conversation with him wherever he happens to be, such as in an airport, bus terminal, or other public place. In such cases, it is proper to ask whether a reasonable person would feel free to continue on his way or to ignore the police presence

altogether. *See generally Florida* v. *Royer*, 460 U.S. 491 (1983); *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

Here, petitioner's state of mind is irrelevant for the simple reason that the police *did* physically constrain his movement. For that reason alone, *Florida* v. *Bostick*, 501 U.S. 429 (1991), upon which the California Supreme Court relied, is inapposite. In *Bostick*, the Court held that an individual who is approached by an officer while sitting on a bus during a scheduled stop should generally be treated no differently, for Fourth Amendment purposes, from an individual sitting in a bus *station* while waiting for the bus to arrive. *See id.* at 431, 439-440; *see also United States* v. *Drayton*, 536 U.S. 194, 204 (2002) (same). The Court concluded that, in either case, a reasonable person generally would feel "at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (internal quotation marks omitted). In all such cases, however, the critical fact is that the police themselves have taken no steps that physically constrained the individual's freedom of movement. In a traffic stop, by contrast, the police obviously *do* impose such a constraint. For that reason, and those discussed in Part II below, the California Supreme Court's reliance on *Bostick* is untenable.

The California Supreme Court also misread *California* v. *Hodari D.*, 499 U.S. 621 (1991), for the curious proposition that petitioner could not have been "seized" because, "as the passenger, [he] had ~~no~~ *ability* to submit to the [officer's] show of authority" in ordering the traffic stop. Pet. App. 45 (emphasis added); *see id.* at 44-46. In *Hodari D.*, the defendant dropped inculpatory evidence while running away from police officers who had, to that point, failed in their efforts to detain him physically. He then moved to suppress the evidence on the theory that the police had already "seized" him at the time he discarded it. This Court held that "[t]he language of the Fourth Amendment . . . cannot sustain respondent's contention. The word 'seizure' . . . . does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee."

499 U.S. at 626. Instead, under the plain meaning of the word, a suspect can be "seized" either if he submits to official authority or, alternatively, if the police succeed in "actually bringing [him] within physical control." *Id.* at 624. That definition, however, plainly encompasses the status of a passenger in a successful traffic stop, in which the police bring a car and its occupants "within physical control," *id.*, by forcing them to pull over to the side of the road.

Finally, the California Supreme Court misconstrued this Court's statement in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), that "'a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement.'" Pet. App. 41 (quoting *Sacramento*, 523 U.S. at 844, in turn quoting *Brower* v. *County of Inyo*, 489 U.S. 593, 596-597 (1989)). In both *Sacramento* and *Brower*, where this quote first appeared, the Court was making the unexceptional point that the police do not "seize" an individual for Fourth Amendment purposes when they *unintentionally* constrain his movement, as through negligence—for example, "if a parked and unoccupied police car slips its brake and pins a passerby against a wall." *Brower*, 489 U.S. at 596. Indeed, the *Brower* Court was careful to add that, so long as "the detention or taking itself" is deliberate, "[a] seizure occurs even when *an unintended person* or thing is the object of the detention or taking." *Id.* (emphasis added). That, of course, is precisely what happens in a traffic stop: the police seize the car and its occupants "through means intentionally applied," even when the passengers are themselves "an unintended . . . object of the detention." *Id.* at 596-597 (emphasis omitted).

In sum, petitioner was seized *at least* through the point at which Ms. Simeroth's car came to a complete stop. That conclusion alone is enough to warrant the suppression of the subsequently discovered drug evidence.[4] Once the officer

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[4] Because the California Supreme Court held that petitioner was subject to no seizure in the first place, it did not revisit the intermediate state court's determination that the drug evidence discovered during the

(unlawfully) seized petitioner by forcing the car to the side of the road for no legitimate reason, petitioner's illegal seizure became a direct and but-for cause of the discovery of the illegal drugs, thereby triggering the exclusionary rule.[5] Of course, petitioner's case for excluding this evidence is even more straightforward if, as we argue below, the Court further finds that the unlawful seizure persisted throughout this traffic stop.

II. A PASSENGER IN A TRAFFIC STOP REMAINS "SEIZED" UNTIL HE HAS RECEIVED SOME OBJECTIVE INDICATION THAT HE IS FREE TO LEAVE AND IT IS SAFE FOR HIM TO DO SO

If the Court agrees that a traffic stop results in the "seizure" of a car's passengers, it should give further guidance on how long that seizure persists during the typical stop—a question that may well have significance for exclusionary-rule purposes in a variety of contexts. There are two components to this question. First, in general, a reasonable passenger will not consider himself free to leave a car that has been pulled over by the police until, at the earliest, the de-

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traffic stop was the inadmissible fruit of an unlawful seizure. *See* Pet. App. 34, 52. On its face, the question on which this Court granted certiorari addresses only the substantive Fourth Amendment question, not whether any subsequently obtained evidence should be suppressed under the exclusionary rule. *See* Pet. i. Nonetheless, because respondent's brief in opposition to certiorari focused entirely on the exclusionary rule rather than the substantive Fourth Amendment question, we briefly address that dimension of the case here. We refer the Court to petitioner's briefs for a more detailed treatment of this fact-specific set of issues.

[5] *See, e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 485-488 (1963); *Mosley*, 454 F.3d at 254, 256; *United States* v. *Johns*, 891 F.2d 243, 244-245 (9th Cir. 1989); *see generally* Pet. Reply 3-7. Of course, this would be an entirely different case if the traffic stop were *lawful*, the passenger sought to challenge only the fruits of an assertedly unlawful *search* of the car, and the passenger lacked any ownership interest in the things searched. *See generally Rakas* v. *Illinois*, 439 U.S. 128 (1978). Here, petitioner's exclusionary-rule claim has merit because he traces the discovery of the evidence to an illegal seizure of his person, rather than an illegal search of someone else's car.

taining officer has approached the car, assessed the situation, and given some indication that the passenger may leave. Second, even then, the passenger cannot be deemed free to leave the scene unless it is safe and feasible for him to do so. We address each of these conditions in turn.

A. A Passenger Remains Seized If He Has Received No Indication That He Is Free To Leave

1. This Court and others have conferred extraordinary discretion on police officers to control the movements of a stopped car's occupants in order to protect the safety of officers and passengers alike. As this Court has recognized, traffic stops pose unique dangers to officers: an officer typically pulls a car over without knowing who or what is inside and must approach the car carefully to avoid the surprise of a sudden attack. For that reason, this Court held in *Maryland* v. *Wilson* that police officers have bright-line authority to order any passenger out of a car during a traffic stop. 519 U.S. at 410, 414-415. The Court reasoned that the "interest in officer safety" outweighs the liberty interests of those passengers who wish to remain seated because, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle," and "the additional intrusion on the passenger is minimal." *Id.* at 413-415.

Indeed, police organizations have strongly advocated giving officers broad authority to control the movements of passengers during traffic stops, noting that such stops result in more officer fatalities than almost any other law enforcement context.[6] Thus, for safety-related reasons, some police

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[6] *See, e.g.*, Nat'l Ass'n of Police Orgs., Inc. Amicus Br. in Support of Pet. 4-6, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 435918 (noting that from 1977 through the end of 1995, 445 officers were killed while performing traffic enforcement tasks, and that—depending on the time period—between 12.5 and 19.2 percent of officer deaths have occurred during traffic stops); *see also* Criminal Justice Legal Found. Amicus Br. in Support of Pet. 1, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 439106 (noting that traffic stops are "great sources of police deaths" and that "[e]ach stop carries the potential for

organizations have advocated a bright-line rule authorizing officers to detain passengers and control their movements during all traffic stops.[7]

Many courts have heeded that call. Citing basic concerns for officer safety, every federal court of appeals that has addressed the issue has held that police officers may order passengers to *stay in the car* during a traffic stop.[8] As one court of appeals has explained, "[a]llowing a passenger ... to wander freely about while a lone officer conducts a traffic stop presents a dangerous situation by splitting the officer's attention between two or more individuals, and enabling the driver and/or the passenger(s) to take advantage of a distracted officer." *United States* v. *Williams*, 419 F.3d 1029, 1034 (9th Cir.), *cert. denied*, 126 S. Ct. 840 (2005).

Of course, different police departments will adopt different approaches to the control of traffic stops: some may always order passengers out of the car, as *Maryland* v. *Wil-*

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tragedy as the officer encounters the occupants of the vehicle.... [T]here is no simple way of readily separating the potentially violent from the routine.").

[7] *See, e.g.*, Am. For Effective Law Enforcement et al. Amicus Br. in Support of Pet. 4-10, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 422145 (arguing for "a 'bright-line' rule that when a law enforcement officer makes a lawful traffic stop, the officer has an absolute right to control both the driver and passengers by requiring them to either remain inside the vehicle or exit and remain in the immediate vicinity during the stop" (capitalization altered)).

[8] *See United States* v. *Williams*, 419 F.3d 1029, 1034 (9th Cir.), *cert. denied*, 126 S. Ct. 840 (2005); *United States* v. *Clark*, 337 F.3d 1282, 1282-1283 (11th Cir. 2003); *Rogala* v. *District of Columbia*, 161 F.3d 44, 53 (D.C. Cir. 1998); *United States* v. *Moorefield*, 111 F.3d 10, 11, 13 (3d Cir. 1997). State courts have reached a more complex mix of outcomes. *Compare State* v. *Hodges*, 631 N.W.2d 206, 210-211 (S.D. 2001) (police officers may prevent a passenger from walking away from a legally stopped vehicle even when "'no special danger to the police is suggested'" (quoting *Wilson*, 519 U.S. at 415)), *with Wilson* v. *State*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) (police may not detain a passenger who attempts to leave the scene of a vehicle stop unless they "have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others").

son permits; some may always order passengers to remain in the car; and some may leave the disposition of passengers to the discretion of individual officers. Our central point here, however, is that the courts have given officers who conduct traffic stops enormous authority to limit the freedom of passengers during such stops. And given the variable procedures that different police jurisdictions use in dealing with passengers, the prudent passenger would sit still during a typical traffic stop until instructed to do otherwise.

In short, a reasonable passenger would not feel free to leave a car that has just been pulled over until, at a minimum, the officer has approached the car, assessed the situation, and given the passenger some basis for concluding that he may leave without interfering with the officer's routine. That is particularly true of traffic stops that, like this one, occur late at night, where poor visibility could make both the officer and the car's occupants more volatile in the face of unexpected developments than they might be on a well-traveled street during the daytime. The danger is as much to the passenger as to the officer. A passenger in the early stages of a traffic stop might rightly fear for his own safety if he tries to leave the car prematurely, because an officer may well react with a show of force to any unexpected movement by a passenger while the officer is approaching the car. Under the circumstances, the police and passengers alike are entitled to expect that passengers will stay in the car until after an officer has communicated with the occupants. And for the same reasons, the passengers remain "seized" in these circumstances.

2. In any event, when an officer pulls a car over, a passenger has no way of knowing whether the stop has something to do with his or her presence in the vehicle. The passenger's ignorance necessarily continues at least until the officer has explained the reason for the stop. The California Supreme Court's contrary assumption—that the driver and passenger alike know from the outset that a traffic stop relates only to the driver (Pet. App. 45-46)—is wrong.

Although most traffic stops are occasioned by the driver's breach of the traffic laws, many are prompted by suspicions about the passengers. For example, the police pull over cars because a passenger does not appear to be wearing a seatbelt, because the passengers are suspected to be illegal aliens, because a passenger is observed throwing litter from the car, because a passenger is seen carrying what might be an open liquor bottle, or because the police believe they recognize the passenger as a fugitive or the subject of outstanding warrants.[9] At least until the officer has approached the car and explained why he pulled it over, a passenger cannot know for certain whether he would be thwarting the very purpose of the traffic stop if he were to step out of the car and walk away.

That point is true as a general matter, but it is particularly true of the category of cases at issue here: cases in which an officer pulls a car over because he believes that the driver committed a traffic offense *but is mistaken*. In such cases, the driver and passenger alike are likely to be puzzled about the reason for the stop because the driver will have committed no traffic infraction. And a reasonable passenger in that situation would thus be particularly hesitant to leave the car before receiving some assurance that the traffic stop has nothing to do with him.

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[9] *See, e.g.*, *United States* v. *Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629 & n.1 (D. Md. 2001) (passenger's failure to wear seat belt was grounds for traffic stop); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 874-875 (1975) (agents stopped car on suspicion that the occupants were illegal aliens); *People* v. *Roth*, 85 P.3d 571, 573 (Colo. Ct. App. 2003) (police stopped car after observing passenger commit littering violation); *United States* v. *Lopez*, 710 F.2d 1071, 1072-1073 (5th Cir. 1983) (officers stopped car to determine whether one of the passengers was a federal fugitive). In this case, however, the officer does not claim that he recognized petitioner before pulling the car over.

B. A Passenger Remains Seized If He Cannot Prudently Leave The Site Of The Traffic Stop

Even if the police formally indicate that a passenger is free to leave, the passenger should be deemed to remain "seized" throughout the duration of a traffic stop if his surroundings—the stretch of road where the police have stopped the car against the occupants' will—make it unsafe or infeasible for him to walk away. For example, when a police officer pulls a car to the side of a busy interstate highway, it would be exceptionally dangerous for the passenger to begin walking down the shoulder of the highway in search of an exit ramp. Indeed, precisely because of the grim fatality rate for pedestrians on interstate highways, the great majority of states have enacted laws explicitly forbidding pedestrian traffic on such highways.[10] Petitioner and the driver were not on an interstate highway, but their situation was little better: they were pulled off to the side of a dark road in the middle of the night.

The California Supreme Court nonetheless concluded that a car passenger's practical inability to walk away from a traffic stop is no more significant from a Fourth Amendment perspective than the inconvenience the bus passengers would have faced in *Bostick* and *Drayton* if they had chosen to leave their respective buses when approached by police officers. Pet. App. 46-47. But those cases are quite beside the point because, as discussed in Part I, the police there did nothing to physically constrain anyone's movement and triggered no "seizure" in the first place. Here, by contrast, po-

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[10] *See* AAA Foundation for Traffic Safety, *Report Summary—Pedestrian Fatalities on Interstate Highways: Characteristics and Countermeasures* (1997), *available at* http://www.aaafoundation.org/pdf/fatalped.pdf (last visited Mar. 4, 2007) (noting that ten percent of the country's pedestrian fatalities occur on Interstate highways, even though the Interstate system constitutes only about one percent of the country's total road mileage). *See, e.g.*, Ohio Rev. Code Ann. § 4511.051 (prohibiting pedestrians from using the right-of-way of freeways in most circumstances); N.Y. Veh. & Traf. Law § 1229-a (same, with respect to state expressways and interstate highways).

lice illegally compelled petitioner and Ms. Simeroth to alter their intended course and stop on the side of the road at 1:40 in the morning.

In *Bostick*, the police boarded a bus during a scheduled stop and began asking questions of a particular passenger—Bostick—who aroused an inarticulable suspicion. The Court found that Bostick was not unlawfully "seized," however, if a reasonable person in his position would have "fe[lt] free to decline the officer's requests or otherwise terminate the encounter." 501 U.S. at 436. Although the Court did not ultimately decide that issue—it remanded for further factual development—it suggested that Bostick could have disregarded the officers altogether, and that if he had done so, their presence would not even have affected the course of his day. *Id.* at 437. Likewise, in *Drayton*, 536 U.S. 194, the Court found no seizure where, with the consent of the bus driver, the police officers boarded a bus during a scheduled stop and began interrogating selected passengers. The Court reasoned that "the officers gave the passengers no reason to believe that they were required to answer the officers' questions"; that "[i]t is beyond question that had this encounter occurred on the street, it would be constitutional"; and that "[t]he fact that an encounter takes place on a bus does not of its own transform standard police questioning of citizens into an illegal seizure." *Id.* at 203-204; *see also INS* v. *Delgado*, 466 U.S. 210, 218-221 (1984) (finding no seizure of workers who were free not to answer questions posed to them by federal immigration agents at their work site).

This case is quite different. The police did not approach Ms. Simeroth's car while it was stopped anyway and look inside at her invitation. Instead, the officer activated his rooftop lights and forced the car to pull over to the side of the road against the wishes of the driver and the passenger alike. And this stop was not only uninvited, but unlawful: Ms. Simeroth had done nothing wrong, and the officer had no justification for pulling her car over. Having unlawfully stopped the vehicle, the officer then peered inside and recognized petitioner. All subsequent evidence introduced

against petitioner was the fruit of observations gained during the first moments of this unlawful stop.

In short, petitioner—quite unlike the defendants in *Bostick* and *Drayton*—never had the option of ignoring the police presence and continuing uninterrupted to his destination. The police physically constrained petitioner's movements by forcing the car in which he was riding to the side of the road; approached that car without anyone's consent and with no lawful rationale; and from there pursued an inquiry that, without any voluntary cooperation from petitioner, inevitably led to the accumulation of drug evidence against him. That evidence should be suppressed as the fruit of this unlawful seizure.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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